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BEQUESTS FOR THE CARE OF SPECIFIC ANIMALS

JAMES T. BRENNAN

I. IN GENERAL

Today bequests including trusts for the performance of religious services or for the care of gravesites are universally upheld, either under common law or specific authorizing statutes. In the few jurisdictions where such trusts are not regarded as charitable trusts, they are upheld as honorary trusts. When we turn to the testamentary dedication of property for the care of specific animals, we find no such general acceptance. Gifts for the care of specific animals, usually pets of the deceased testatrix, have been upheld only in England, Ohio and Kentucky, despite the fact that the scholarly literature in general favors the validity of such bequests.\(^1\) Two rules of law have lead the American courts generally to hold such bequests invalid. They are the requirement that a trust have a human beneficiary and the rule against perpetuities. Of the two, the lack of a human beneficiary capable of enforcing the bequest is most significant. Even cases decided on the basis of the rule against perpetuities often declare the rule violated because the rule is defined in terms of human lives.\(^2\) It should be noted that the cases perhaps most directly in point are the cases involving bequests to slaves prior to the Emancipation Proclamation and the Thirteenth Amendment. However, these cases have not been cited by the courts in discussing the validity of bequests for the care of specific animals.\(^3\) Nor are the cases involving bequests for religious services or the erection or maintenance of grave monuments frequently cited in the American cases involving the validity of bequests for the care of specific animals.

1. In addition to Scott and Bogart's Treatises on Trusts, the following secondary literature deals with bequests for the care of specific animals: Wolfe, Honorary Trust in Pennsylvania, 42 DICK. L. REV. 161 (1938); Smith, Honorary Trusts and the Rule Against Perpetuities, 30 COLUM. L. REV. 60 (1930); Clark, Unenforceable Trusts and the Rule Against Perpetuities, 10 MICH. L. REV. 31 (1911); Gray, Gifts for a Non-Charitable Purpose, 15 HARV. L. REV. 509 (1902); Ames, The Failure of the Tilden Trust, 5 HARV. L. REV. 389 (1892); Scott, Control of Property by the Dead, 65 PA. L. REV. 527 (1917); Note, 42 YALE L.J. 1290 (1933); Note, 17 MINN. L. REV. 563 (1933); Note, 46 HARV. L. REV. 1036 (1933); Comment, 17 SYRACUSE L. REV. 705 (1966). ANNOT., 66 A.L.R. 465 (1930); ANNOT., 73 A.L.R.2d 1032 at 1043 (1960); ANNOT., 31 A.L.R. 430 (1924).

2. RESTATEMENT OF PROPERTY § 374, Comment h (1944) states:

The lives which can be used in measuring the permissible period under the rule against perpetuities must be lives of human beings. For many purposes in the law a corporation is a "person," but not for the measurement of the period described in Clause (a). So also no such measurement may be expressed in terms of the life of any animal (other than man), even though the animal\(^4\) is one of a type having a life span typically shorter than that of human beings, as for example, a dog or a horse.

II. THE ENGLISH LAW

A. Honorary Trusts

Attorney-General v. Whorwood\(^4\) is generally regarded as the first English case involving the validity of bequests for the care of specific animals because of its often quoted dicta:

When a man will settle his estate in this odd, whimsical way, the court ought not to establish it: it is locking up property, which is against the policy of the law of England. (Italics in the original) The court has refused carrying into execution a particular turn of mind, though it was not a superstitious or illegal, but an indifferent use; as to feed sparrows, &c. (Italics supplied), especially as this is for ever.\(^5\)

The case actually concerned the validity of a devise of the testator’s house to University College, Oxford, for the use of a senior fellow who was required to be a divine.

The first English case upholding the validity of a bequest for the care of specific animals was Mitford v. Reynolds.\(^6\) Provision 9 of Robert Medford’s will read:

Ninthly, I will, devise, give and bequeath the remainder of my property, of whatever kind and description, and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea [108] or pretence, to be used, rode or driven, or applied to labour) to the Government of Bengal, for the express purpose of that Government applying the amount to charitable, beneficial and public works at and in the City of Dacca in Bengal; the intent of such bequest and direction being that the amount shall be applied exclusively to the benefit of the native inhabitants, in the manner they and the Government may regard to be most conducive to that end.

Since Lord Lyndhurst had held the ninth clause valid, the court felt that it was not at liberty to decide otherwise. It does not appear that the validity of the provision for Mr. Medford’s horses was forcefully challenged.

The classic case of In re Dean\(^7\) arose a half century later. Mr. Dean devised his freehold estates subject to and charged with an annuity of

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5. Id. at 536.
7. [1889] 41 Ch. D. 552.
£750 for the care of his horses and hounds. James Cooper who had the life use of the estates brought the action to have the charge on the estate in favor of the animals declared invalid or in the alternative for a declaration that he was entitled to any excess of the £750 not required to carry out the trust for the benefit of the testator's horses and hounds.

The plaintiff presented the classic argument against the validity of the annuity. He argued that such a gift for specific animals was not a charitable gift; that since the trust was not charitable, it failed because there

8. I give to my trustees my eight horses and ponies (excluding cart horses) at Littledown, and also my hounds in the kennels there. And I charge my said freehold estates hereinbefore demised and devised, in priority to all other charges created by this my will, with the payment to my trustees for the term of fifty years commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of £750. And I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit; but this condition shall not imply any obligation on my trustees to leave the said stables, kennels and buildings in a state of repair at the determination of the said term; but I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion. And my will is that, so long as there shall remain any of my said horses, ponies and hounds living, they shall be kept in the stables, kennels and buildings which they now occupy. And I empower my trustees to recover payment of the said sum of £750 by distress and entry upon and receipt of the rents and profits of the lands so charged therewith as aforesaid, or any part thereof, when in arrear for twenty-one days. I declare that the said horses and ponies shall not be worked after my death, but may at all times be exercised on my freehold property at the discretion and direction of my trustees, and that neither they nor the said hounds shall be sold, but that the latter may be used by the person for the time being entitled to the possession of the settled hereditaments. I direct that whenever my trustees shall consider that one or any of the said horses and ponies should be killed, the same shall be shot with a double-barrelled gun, both barrels loaded at the same time, with clean barrels and a full charge. I bequeath to my trustees for the term of fifty years above mentioned, if any of the said horses, ponies, or hounds shall so long live, the cottage and garden now occupied by W. Vatter, and also the stables, kennels and buildings now occupied by my said horses, ponies, and hounds; and the yards appurtenant thereto. I bequeath to The Royal Society for the Prevention of Cruelty to Animals in London the sum of £2000 free of legacy duty, and that the same and the legacy duty thereon respectively shall be paid exclusively out of such part of my personal estate as may be legally bequeathed for charitable purposes. In consideration of the maintenance of my horses, ponies and hounds being a charge upon my said estate as aforesaid, I give all my personal estate not otherwise disposed of unto the said James Cooper, his heirs, executors, administrators, and assigns absolutely.

Id., at 553.

9. It should be noted that if it were a charitable gift, it would have failed under English law because an annuity for charitable purposes which was a charge on land was invalid. It may also be noted that under old New York Real Property Law § 96 (no longer in effect), and in other states which had or still have this provision of the New York Revised Statutes
was no *cestui que trust* capable of enforcing it; and that it was void, as
tending to a perpetuity, since it depended on the lives of animals, not
humans.

The court told counsel that there was no need to even bother arguing
that the gift was not charitable.10 As to the argument that the trust was
void because there was no person capable of enforcing it, the court refused
to adopt this view because of the validity of trusts for the erection11 or
maintenance of monuments “although it is difficult to say who would be
the *cestui que trust* [italics in original] of the monument.”12 The court
rather obviously considered itself bound by *Mitford v. Reynolds* and
pointed out that the validity of the bequest in favor of the animals had to
have been passed on in that case because it was the duty of the East Indian
Government to raise the point on behalf of the charity. The court stated
that a sum of £1800 Consols had been set aside for the maintenance of the
horses until their death.

On the issue of whether or not such bequests were against public policy,
the *Dean* court stated:

> Is there then anything illegal or obnoxious to the law in the
> nature of the provision, that is, in the fact that it is not for
> human beings, but for horses and dogs? It is clearly settled by
> authority that a charity may be established for the benefit of
> horses and dogs, and, therefore, the making of a provision for
> horses and dogs, which is not a charity, cannot of itself be
> obnoxious to the law, provided, of course, that it is not to last for
too long a period.13

The defendant trustees argued that the gift was an absolute and bene-
ficial one to the trustees, coupled with a statement of the testator’s motive
for making it. This is a very common argument advanced in the cases in-
volving bequests for the care of specific animals. The court held that the
language of the bequest did not admit to such an interpretation.

As to the rule against perpetuities, in discussing the validity of bequests
for the care of monuments, the court stated:

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10. At this time there appears to have been a more hostile judicial attitude toward
charitable bequests than in the case today. Also the English courts may not be as ready to
hold bequests charitable as are the American courts. Footnote 9 *supra* may be one reason
for this difference in judicial attitude.

not discussed previously.


In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal.\textsuperscript{14}

Thus the court in \textit{In re Dean} upheld the validity of an annuity for the benefit of specific animals on the precedent of both clause 8 and clause 9 in \textit{Mitford v. Reynolds} and the court's opinion that since it is not against public policy to benefit unknown animals, it is not against public policy to benefit designated animals. The court did not meet the legal requirements for a \textit{cestui que trust} and compliance with the rule against perpetuities head-on.

The validity of a direction by the testator that his trustees pay to his wife, so long as she and any of his dogs and horses were alive, for the keep of his dogs and horses while living and not given away or otherwise disposed of by her three shillings a week for each dog and fifteen shillings a week for each horse was recognized in \textit{In re Hawkins}.\textsuperscript{15} There the gift was held subject to reduction for the payment of taxes under the Finance Act of 1941.\textsuperscript{16}

\textit{In re Thompson}\textsuperscript{17} a testator bequeathed £1000 to a friend, Mr. Lloyd, to be applied by him in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox hunting. Mr. Lloyd expressed his willingness to carry out the testator's intention. In permitting Mr. Lloyd to carry out the trust, the court said:

\begin{quote}
No argument has been put forward which could justify the Court in holding this gift to be a gift in favour of charity, although it may well be that a gift for the benefit of animals generally is a charitable gift: but it seems to me plain that I cannot construe the object for which this legacy was given as being for the benefit of animals generally. In my judgment the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given.\textsuperscript{18}
\end{quote}

\subsection{B. Charitable Trusts}

Since a bequest for a specific animal was upheld as a charitable trust under a Kentucky statute, the English cases concerning whether bequests for animals constitute a valid charity should be mentioned. \textit{In re Grove-}

\begin{itemize}
\item \textsuperscript{14} \textit{Id.} at 557.
\item \textsuperscript{15} [1942] 1 Ch. 67.
\item \textsuperscript{16} 4 & 5 Geo. 6, c. 30, § 25 (1941).
\item \textsuperscript{17} [1933] 1 Ch. 342.
\item \textsuperscript{18} [1934] 1 Ch. 342, 343.
\end{itemize}
Grady testatrix established a trust for three purposes. The first purpose was for the acquisition of land as a game refuge if land could be legally acquired for that purpose. The lower court held that a trust which included within its scope animals which were harmful to the human race was nevertheless a valid charitable trust. The Court of Appeal reversed with one dissent stating that such a purpose involved no benefit to the community which was required to make a trust charitable. Lord Hansworth in his opinion stated:

The one characteristic of the refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harry one another.

Such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind.

The purpose of the trust in light of the public policy reasons for excluding charitable trusts from compliance with the rule against perpetuities may well have been decisive as Lord Hanworth said:

Plainly, therefore, a very wide interpretation has been given to the term charity, where the objective is not only the condition of men, but also of animals; but it is not to be treated as inclusive of every purpose, which the whim or caprice of a testator may prescribe. The caution administered by Lord Campbell in

19. [1929] 1 Ch. 557.
20. See n.9, supra.
21. Lord Russell stated:
In my opinion it is not [a charitable trust]. It is merely a trust to secure that all animals within the area shall be free from molestation or destruction by man. It is not a trust directed to ensure absence or diminution of pain or cruelty in the destruction of animal life. If this trust is carried out according to its tenor, no animal within the area may be destroyed by man no matter how necessary that destruction may be in the interests of mankind or in the interests of the other denizens of the area or in the interests of the animal itself; and no matter how painlessly such destruction may be brought about. It seems to me impossible to say that the carrying out of such a trust necessarily involves benefit to the public. Beyond perhaps hearing of the existence of the enclosure the public does not come into the matter at all. Consistently with the trust the public could be excluded from entering the area or even looking into it. All that the public need know about the matter would be that one or more areas existed in which all animals (whether good or bad from mankind's point of view) were allowed to live free from any risk of being molested or killed by man; though liable to be molested and killed by other denizens of the area. For myself I feel quite unable to say that any benefit to the community will necessarily result from applying the trust fund to the purposes indicated in the first object.

In re Grove-Grady, [1929] 1 Ch. 557, 585-86.
22. Id., at 573 and 574.
Jeffries v. Alexander[^23] stands good: "A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed in saecula saeculorum when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law, to be strictly watched and regulated." Illustrations of this limitation or restriction are to be found in the cases. I will refer to Attorney-General v. Whorwood[^24] before Lord Hardwicke, where it is stated that "the Court has refused carrying into execution a particular turn of mind, though it was not a superstitious or illegal, but an indifferent use; as to feed sparrows," to Tatham v. Drummond[^25] in which Lord Westbury rejected a gift "towards the establishment . . . of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered." And in In re Wedgwood[^26] Kennedy, L.J. expresses the opinion that if the intention was the protection and maintenance of noxious animals, or the preservation of beasts of prey or mad dogs, the Court would not find any difficulty as to the answer which is dictated by reason and common sense.[^27]

C. The English Position

The English position on bequests for the care of specific animals is that they are valid. This decision is based on a common sense determination that such bequests do not contravene public morality and the public policy reasons behind the rules of law which require a cestui que trust and compliance with the rule against perpetuities. As long as the directions of the testator are sufficiently definite to be carried out, are not frivolous or capricious, and the trustee is willing to perform the trust, the courts uphold the bequest. The rule against perpetuities with its devious technicalities has not been applied to these bequests, yet the courts in _dicta_ indicate that both the amount of the trust res and the duration must be reasonable. This is a sensible approach because the rule against perpetuities was developed under a system of primogeniture to prevent the tying up of wealth in one family _in saecula saeculorum_. It would only be truly applicable if a testator attempted to provide for the descendants of a specific

[^26]: [1915] 1 Ch. 113, 121.
[^27]: [1929] 1 Ch. 557, 570-71. (Footnotes are the author's).
animal as well as for that animal itself. Since the maximum lifespan of all domestic animals, including the elephant, does not exceed the maximum lifespan of human beings, there is no need to refuse to permit a trust for the benefit of a specific animal to be measured by that animal’s life. Such bequests could be drafted to comply with the rule against perpetuities anyway. However, a human life, probably the caretaker’s, plus 21 years is simply irrelevant to the accomplishment of the purpose of a trust to care for a specific animal.

III. THE AMERICAN LAW

A. The Restatement of Trusts

The Restatement of Trusts, Second in Section 124 states:

Where the owner of property transfers it in trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless such application is authorized or directed to be made at a time beyond the period of the rule against perpetuities.

The Restatement thus declares that no trust is created, but rather merely a power, personal to the donee of the power, is created to apply the property to the designated purpose. Thus, the intention of the testator may be frustrated by the donee of the power in his unfettered discretion. The English courts have not passed on the point whether or not they would order a trustee to perform or appoint another trustee to carry out the testator’s purpose. It would seem that if bequests for the care of specific animals are not contrary to public policy, the performance of such a direction should not be within the discretion of the “trustee.” The testator’s intention should be enforced by the courts. A true trust rather than a personal power of appointment should be held to exist.

Both the English courts and the Restatement agree that the specific non-charitable purpose should not be capricious. Neither the English courts nor the Restatement specifically declare that the amount dedicated to the specific purpose must be reasonable either in light of the social utility of the specific purpose or the amount which would be reasonably required to accomplish the specific purpose. As applied to the care of specific animals, the only real problem is the overfunding of such a trust as occurred in In re McNeill’s Estate where a residue of over $300,000 was left in trust for three animals for life. At 4% interest this would have provided an annual income of $4000 per animal per year. In In re Dean the court held that any excess of the £750 not required for the care of the

horses and hounds should go to the life tenant of the freehold. In Security Trust Co. v. Willett\textsuperscript{29} testatrix left $5000 in 1923 in trust, the net income to be applied to the maintenance of certain family lots and tombstones forever. Subsequently burial locations were changed with the result that upkeep expense on the cemetery lots and tombstones became about $10 per year. In September 1952 the trust fund amounted to $15,000 with an annual income of $600. The court impressed a resulting trust in favor of the estate of the testatrix of the excess proceeds. Thus, excessive funding of honorary trusts should not result in the invalidity of the honorary trust, but rather only the excess over the amount required to accomplish the trust's purpose should be held on a resulting trust for the estate of the testator.

The Restatement requires that honorary trusts comply with the rule against perpetuities. Comment $f$ states:

So also, where the devisee or legatee is authorized to apply the property for the maintenance of one or more animals during the lives of the animals, the provision is invalid since the period of the rule against perpetuities is measured by lives of persons and not lives of animals, whether or not the normal duration of the life of the animal is shorter than that of a human being. Whether in such cases the devisee or legatee can properly apply the property for a period of twenty-one years, on the ground that the annual payments are to be treated as separable, it not within the scope of the Restatement of this Subject.

The reasons why bequests for the care of specific animals should not be subject to the rule against perpetuities are advanced below. This does not mean that an analogous rule should not be applied to such gifts. The appropriate and proper rule should be that bequests for the care of specific animals should be valid for the duration of the lives of the designated animals and for such period only. There is no indication that American courts would adopt such a rule. Hence, wisdom indicates that counsel in America drafting bequests for the care of specific animals comply with the irrelevant and potentially purpose-defeating rule against perpetuities.

B. New York

1. In General

The New York cases holding bequests for the care of specific animals invalid are not only important in New York. They constitute a high percentage of the cases decided in all American jurisdictions on this issue.

\textsuperscript{29} 33 Del. Ch. 544, 97 A.2d 112 (1953).
They are important because they were decided under the then current versions of the New York statutory scheme having its origins in the New York Revised Statutes of 1830 which were widely adopted in other states and still form the basis of the statutory schemes in many jurisdictions.


Section 96 of the New York Real Property Law originally limited the purposes for which express trusts of real property could be created to one or more of the following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;
3. To receive the rents and profits of real property and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;
4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.30

Under subsections 2 and 3 the annuitants, legatees, or beneficiaries would have to be human beings. Hence devises of real property for the care of specific animals were invalid.31

The New York rule against perpetuities was traditionally the two lives rule contained in section 11 of the Personal Property Law32 and section

30. No longer in force in New York. § 7-1.4 of the NEW YORK ESTATES, POWERS AND TRUSTS LAW provides: “An express trust may be created for any lawful purpose.”
32. N.Y. PERSONAL PROPERTY LAW, § 11 (McKinney 1962). As originally enacted in 1909, § 11 of the Personal Property Law provided:

The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.
33. N.Y. REAL PROPERTY LAW, § 42 (McKinney 1929). The section provides that:

The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any
42 of the Real Property Law. In *Matter of Howells*, the court, in defining the term “lives in being” found in the statutes, stated that it referred to human lives, and that a trust may not be limited otherwise than on human lives. New York now has adopted the common law rule against perpetuities in section 9-1.1 of the Estates, Powers and Trusts Law. The new New York rule against perpetuities does not appear to alter the construction of “lives in being” under *Matter of Howells*.

For completeness it should be mentioned that the New York court held charitable trusts invalid for indefiniteness after the adoption of the Revised Statutes of 1830. As a result of the court’s holding the Tilden Trust invalid, charitable trusts were then authorized by statute in Section 113 of the Real Property Law and Section 12 of the Personal Property Law. Section 8-1.1(a) of the Estates, Powers and Trusts Law carries forward these statutory authorizations by providing that:

No disposition of property for religious, charitable, educational or benevolent purposes, otherwise valid under the laws of this state, is invalid by reason of the indefiniteness or uncertainty of limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter.


35. N.Y. EPTL 1-1.1, § 9-1.1 (McKinney 1966), rule against perpetuities. The statute provides:

(a) (1) The absolute power of alienation or the absolute ownership of property is suspended, when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred. (2) Every present or future estate shall be void in its creation, which shall suspend the absolute power of alienation or the absolute ownership of property, by any limitation or condition, for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

the persons designated as beneficiaries. If a trustee is named in the disposing instrument, legal title to the property transferred for such a purpose vests in such trustee; if no person is named as trustee, title vests in the court having jurisdiction over the trust.

Other states have similar statutes. It would be possible under this or similar statutes to conclude that bequests for the care of specific animals are valid charitable bequests because the disposition is for a benevolent purpose. As noted previously, such a conclusion was reached by the Kentucky court in *Willett v. Willett*\(^\text{37}\) in construing a similar statute. However, the New York courts have given no indication that they would be likely to adopt such a construction.

3. The New York Cases

(a) Honorary Trusts

The first of the New York cases involving the validity of a bequest for the care of specific animals is *In re Howells' Estate*.\(^\text{38}\) The testatrix had two cats and three dogs which she attempted to provide for by a trust comprised of the residue of her estate.\(^\text{39}\) In the course of its opinion, the court referred to *In re Dean* and the Irish case of *In re Kelly*,\(^\text{40}\) the latter for the proposition that "lives in being" as the measuring yardstick for the rule

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37. 197 Ky. 653, 247 S.W. 739 (1923).
39. Fifth. All the rest, residue and remainder of my estate, both real, personal and mixed, and wheresoever the same may be situate, and any unused balance of moneys derived under Option No. 1 from the Teachers' Retirement System I give in trust unto my Executor hereinafter named to and for the following uses and purposes:

   To hold, invest and re-invest the principal thereof in such securities as are permitted to Savings Banks in the State of New York, and to collect and receive the income for the care, comfort and maintenance of my pet animals as my friends and co-teachers, Elera Burck and Millison Dutrow shall direct and authorize. These teachers have personally assured me that they would assume such responsibility.

   I further authorize and empower and hereby direct my said Executor or the successor Trustee of my estate to apply the balance of the income from my estate to the care, comfort and maintenance of Charles E. Rattray and should conditions arise during the lifetime of Charles E. Rattray which would bring about the need of more income for his necessary care, comfort and maintenance, in addition to the amount of income herein directed to be applied to or paid for his support, that then and in such case my Executor or his successor Trustee of my estate is authorized and directed to use such portion of the principal of said trust estate as is required to amply provide for his care, comfort and maintenance.

   Eighth. I authorize and empower my Executor or the successor Trustee of my estate to retain any part or portion of my estate as long as he or she shall consider it to be for the benefit of my estate to do so and to provide for the care of my pet animals while they live.

40. [1932] Ir. R. 255.
against perpetuities must be human lives and not the lives of animals.41 Strictly speaking the court did not pass on this issue, however, as the court stated that a trust limited on the lives of five animals and one human being was undoubtedly in violation of the New York two lives rule. Likewise, the court was not required to base its decision on the language "apply them [rents and profits of real property] to the use of any person" of Subsection 3 of Section 96 of the Real Property Law. This was because the language of the will did not permit the construction that the principal was to be divided into separate portions for each animal and the human beneficiary.

The next New York case involving the validity of a trust for the care and burial of testatrix's pets was In re Mills' Estate.42 In her will the testatrix provided:

Fifth: I direct my Executor to set aside a sum sufficient to produce at least One Hundred ($100.00) Dollars per annum, the income to be used for the proper care of any pet or pets I may possess at the time of my death, and to be paid to whosoever may be entrusted with their care, and I prefer that this care be entrusted to the New York Women's League for Animals, 325 Lafayette Street, New York City, New York. At the death of all the pets the principal and accrued interest, if any, to be given to the New York Women's League for Animals, New York City, New York. The burial of any pet or pets to be in Hartsdale Canine Cemetery, Hartsdale, New York, where I own a plot; and for the care in perpetuity of said plot I leave to it, another One Hundred ($100.00) Dollars, the income to be devoted solely thereto.43

However, testatrix's pets all died between the date of her death and the probate of the will. Under the circumstances the trust fund never had to be set aside and no claims appear to have been advanced for sums spent on cat food before the death of the pets. Nevertheless, the court followed the reasoning in Matter of Howells' Estate that the attempted trust failed because it violated both the New York rule against perpetuities and section 96 of the Real Property Law which limited the purposes for which an express trust of real property might be created44 because both statutes employed the word "persons." The court then continued:

41. Quoting from Robinson v. Hardcastle, 29 Eng. Rep. 11, 15 (Ch. 1786). "Lord Thurlow defined a perpetuity in these words: 'What is a perpetuity, but the extending the estate beyond a life in being, and twenty-one years after?' Of course by 'a life' he means lives; and there can be no doubt that 'lives' means lives of human beings, not of animals or trees in California."
42. 111 N.Y.S.2d 622 (1952).
43. Id., at 624.
44. § 96 of the Real Property Law was also applied to trusts of personal property.
With respect to the legacy of $100 to the Hartsdale Canine Cemetery the validity of which is questioned by one of the residuary legatees, the court directs the administrator c.t.a. to submit proof concerning the capacity of said Cemetery to take and whether the testatrix owned a plot therein at her death.\textsuperscript{45}

If these two conditions were met, the bequest for the perpetual care of the cats' graves would be valid under statutes authorizing dispositions of property in trust for the perpetual care and maintenance of private burial plots in cemeteries.\textsuperscript{46} While the legal logic for holding a trust for the care of a live cat invalid and a bequest \textsl{[the statute authorizes a trust]} for the perpetual care of the grave of the same cat valid, is unimpeachable, nevertheless, the resulting inversion of all normal and decent values, renders these results suspect.

(b) Gifts Upon a Condition

Since honorary trusts for the care and maintenance of animals were invalid in New York (and probably would still be invalid under the older New York cases' constructions of language carried over into the present New York rule against perpetuities (Section 9-1.1 of the \textit{Estates, Powers and Trusts Law}), testatrixes desiring to provide for the care of their pets after their death must use other legal devices to accomplish this purpose.

In \textit{In re Murray's Estate}\textsuperscript{47} the court construed a bequest to a person for use in providing for the care of decedent’s cat as a bequest on a condition rather than as an attempted creation of an invalid trust. The court stated that since the condition was the motive of the bequest, the bequest could be properly paid to the legatee if the cat was in existence at the date of the death of the decedent. The court appeared to be taking the position that the existence of the cat at the testatrix’s death was a condition precedent to the validity of the bequest.

In \textit{In re Johnson's Estate}\textsuperscript{48} testatrix’s will provided:

\textit{Seventh: I give and bequeath to Harris A. Stanford, of Saratoga Springs, New York, now in my employ, my two riding mares known as “Bessie” and “Daisy,” respectively, together with all saddles, harness and equipment owned by me and used in connection with said mares at the time of my decease together with the sum of Fourteen Thousand Dollars ($14,000.). My}

\begin{footnotesize}
\begin{enumerate}
\item Robinson v. Adams, 81 App. Div. 20, 80 N.Y.S. 1098 (1903), aff'd, 179 N.Y. 558, 71 N.E. 1139 (1904).
\item 45. 111 N.Y.S.2d at 626.
\item 46. \textit{Real Property Law} § 114-a (McKinney 1945) and \textit{Personal Property Law} § 13-a (McKinney 1962), now \textit{Estates, Powers and Trusts Law} § 8-1.5 (McKinney 1967).
\item 47. 99 N.Y.S.2d 32 (1948).
\item 48. 302 N.Y. 782, 98 N.E.2d 895 (1951).
\end{enumerate}
\end{footnotesize}
wish and direction is that the said Harris A. Stanford apply the said sum of Fourteen Thousand Dollars ($14,000.), and the income, if any, arising from the same, to the care and maintenance of the said two (2) mares, according to his judgment and without restriction.

Testatrix was declared incompetent and her committee disposed of the horses and equipment before her death. There were facts indicating that the testatrix might have intended to benefit the legatee and not merely benefit the horses. The Surrogate, following *In Re Murray's Estate*, held the bequest was a gift on a condition and failed but the decision was reversed on appeal.

In *In re Andrew's Will* testatrix's will provided:

Thirteenth: I give to Lucretia Shaffer $500.00, but as a condition of the legacy, require her to give my dog good care as long as the dog lives.

Nineteenth: All the rest, residue and remainder of my property I direct shall be divided between the legatees named in this will who survive me pro-rated on a basis of their respective legacy. By that I mean that a person who has a legacy for $1000.00 would get twice as much as a person who gets a legacy for $500.00.

The dog mentioned in the will was destroyed by the testatrix prior to her death. Thus, the question for the court was whether the proper interpretation of the language of Article 13 was that of a condition precedent or subsequent. Since testatrix knew of the destruction of the dog and did not change her will and she did not employ language such as "if the dog be living at my death," the court held that the condition was a condition subsequent and hence Lucretia Shaffer was entitled to the specific bequest and to share in the residue.

The following bequest was made by the testatrix in *In re Filkins' Will*:

I give, devise and bequeath to Lottie E. Filkins, widow of my deceased brother Clarence G. Filkins, whatever automobile I may own at the time of my decease and my residence where I now reside, including all of the land and outbuildings as well as all furniture, household furnishings and housekeeping appliances in the house, and I direct that she shall have the right to use and occupy said premises immediately upon my death. This bequest and devise, however, are made expressly contingent upon the said Lottie E. Filkins furnishing proper care for any

49. 228 N.Y.S.2d 591 (1962).
50. 120 N.Y.S.2d 124, 125 (1952).
and all pets which I may own at the time of my decease for as long as they shall live.

The court in a very concise opinion wrote:

The first sentence of said paragraph contains a positive, absolute bequest and devise. The provisions of the last sentence were meant by testatrix to be performed by the beneficiary, Lottie E. Filkins, during her enjoyment of her bequest and devise. Hence the provision is not a condition precedent but is a condition subsequent.

The vested interests of Lottie E. Filkins in said bequest and devise continue, subject to divestment only upon the occurrence or enforcement of a legal invalidating condition. Since the condition is based upon the lives of several animals, it clearly is void under the statute against unlawful suspension of the power of alienation. Moreover, there is no gift over in the event of failure to perform the condition, and hence the condition cannot operate to disturb the vested interests of Lottie E. Filkins.

It would thus appear that gifts on condition that the legatee or devisee care for animals will not effectuate the testatrix's purpose in New York. The condition itself is invalid. If the condition is construed as a condition subsequent, the legatee or devisee will take the gift absolutely and free of the condition. If the existence of the animal at the date of decedent's death is construed as a condition precedent to the validity of the devise or bequest and the animal predeceases the testatrix, the gift will fail.

Hence gifts on a condition are no more effective than absolute gifts to the legatee accompanied by precatory language expressing the testatrix's desire that the animal be cared for. They are legally unenforceable and the actual care of the pets rests upon the moral character and sense of duty and obligation of the legatee. However, it should be noted that as a practical matter this is also true in jurisdictions which uphold such bequests as honorary trusts. The actual accomplishment of the testatrix's intention in states recognizing honorary trusts is dependent upon the donee of the power's personal willingness to perform. Indeed, in the sense that the unwillingness of the donee of the power to perform the honorary trust results in the passing of the property to the testatrix's estate, an honorary trust is merely a condition subsequent which the courts will enforce.

There is one practical difference in New York between attempting to create an invalid trust for the care of specific animals and an invalid condition subsequent for the same purpose. When the trust is declared invalid, the property passes to the testatrix's estate and ultimately to
parties who may feel under less of an obligation to care for the animals than the trustee would have felt. When the condition subsequent is declared invalid, the devisee or legatee holds the property absolutely and free of the condition; but the devisee or legatee was presumably selected by the testatrix as a person willing to care for the animal.

C. Other Jurisdictions

1. Honorary Trusts

The only American case directly upholding the validity of an honorary trust for the care of a specific animal is *In re Searight's Estate*. In that case the testator directed $1000 to be set aside for the care of his dog to be expended for this purpose at a rate of 75¢ per day. The court quoted the *Restatement of Trusts*, Section 124 and Scott's treatise on the subject and concluded: "Whether called an 'honorary trust' or whatever terminology is used, we conclude that the bequest for the care of the dog, Trixie, is not in and of itself unlawful." The court adopted the *Restatement of the Law of Property* definition of the rule against perpetuities in Section 374 which permits a maximum absolute period of 21 years. Since the $1000 principal plus all interest would have to be expended long before the period of 21 years expired, the court found the bequest did not violate the rule against perpetuities.

The court held that the Ohio succession tax could not be levied against the funds expended in carrying out the honorary trust since Trixie was not a person. This part of the decision may arguably be incorrect. Trixie became the property of Florence Hand. The older American slave cases held that property acquired by the slave belonged to the master. By analogy, the property should have been held to be that of Florence Hand and hence taxable, particularly since Trixie was now Florence's dog and but for the trust fund she would have to pay for the dog's care out of her own funds.

In *Richberg v. Robbins* the court upheld the probate of the following will which had been denied probate by the Probate Court on the grounds that a dog cannot be made a legatee.

51. 87 Ohio App. 417, 95 N.E.2d 779 (1950).
52. Id., at 418, 95 N.E.2d at 780. The testator provided that:
I give and bequeath my dog, Trixie, to Florence Hand of Wooster, Ohio, and I direct my executor to deposit in the Peoples Federal Savings and Loan Association, Wooster, Ohio, the sum of $1000.00 to be used by him to pay Florence Hand at the rate of 75 cents per day for the keep and care of my dog as long as it shall live. If my dog shall die before the said $1000.00 and the interest accruing therefrom shall have been used up, I give and bequeath whatever remains of said $1000.00 to be divided equally among those of the following persons who are living at that time, to wit: Bessie Immler, Florence Hand, Reed Searight, Fern Olson and Willis Horn. Id.
53. See generally 58 C.J. *Slaves* § 14 (1932).
I, Gerald S. Richberg do on this seventh day of December 1947 will all my earthly possessions to my dog of which is an American Pit Bull female. Black with white spot in breast. Named Dixie. After all my burial and hospital expenses (if any) are taken care of and Clay Robbins of 194 S. Somerville, Memphis, Tennessee to be administrator. This being written at my request and signed in the presence of each. And $40.00 per month to be the amount spent for the dog's care.

In upholding probate the court said:

We find it unnecessary to decide the interesting question whether a dog may be a legatee for the reason that the language of the instrument taken as a whole raises the question whether there was an attempt to bequeath property to the dog or an attempt to set up a private trust for the care of a specific animal, for which latter supporting authority will be found in Page on Wills (3d Ed.) Section 1193, citing In re Dean, L.R. 41 Ch. Div. 552; Willett v. Willett, 197 Ky. 663, 247 S.W. 739, 31 A.L.R. 426.

It is a matter of construction of the will which is not a proper issue in probate proceedings. Jones v. Jones, 163 Tenn. 237, 43 S.W.2d 205; Condry v. Coffey, 163 Tenn. 508, 43 S.W.2d 928.55

One can only speculate on the basis of this language that honorary trusts for the care of specific animals will be upheld in Tennessee.

In New England Trust Co. v. Folsom56 testatrix provided for the establishment of a trust with the power to invade corpus “for the boarding during their respective lifetimes of such cats as may be owned by me at the time of my death.” The court did not pass on or even indicate its opinion of the validity of this trust as the issue before the court was the testamentary capacity of the testatrix which the court held under the circumstances to be a question for a jury.

In the Pennsylvania cases of In re Renner’s Estate57 the lower court found an honorary trust on the following language:

Fifth: I give, devise and bequeath unto my good friend, Mary Faiss Riesing, my home and garage at No. 1324 N. Marston Street, Philadelphia, together with the entire contents thereof, including my pets and my flower garden, absolutely.

Sixth: All the rest, residue and remainder of my estate, real and personal, of whatsoever kind and wheresoever situate, I

55. 33 Tenn. App. at 68, 228 S.W.2d at 1021.
give, devise and bequeath unto my executrix, hereinafter named, IN TRUST, however, for the maintenance of my pets, which I leave to her kind care and judgment, and for their interment upon their respective deaths in the Francisvale Cemetery. Upon the death and interment of the last of my pets to survive, I give, devise and bequeath my entire residue estate so held in trust unto the said Mary Faiss Riesing, absolutely and in fee.\(^{58}\)

The court concluded that the estate of Mary Faiss Riesing vested in the residue immediately. Hence, under the doctrine of acceleration, even if the appellant niece and nephew were correct that an honorary trust for the care of specific animals were invalid, they would still have no interest in the residue. While it was not necessary to the court's decision, the court did declare:

We all agree that the estate vested in the legatee at testator's death. His will meant that she should take the residue from that time; he wished her to apply as much as she considered necessary to the care of the pets and to retain the rest for her own use. There was no trust in the sense in which that term is used in courts of equity in this Commonwealth. The entire estate, legal and equitable, passed to the legatee. There was no cestui que trust who could call her to account. There was no charitable trust. She owed no enforceable duty to anyone. If she had predeceased the testator, no successor could have exercised "her kind care and judgment," which was what testator desired.\(^{59}\)

It would thus appear that honorary trusts for the care of specific animals are invalid in Pennsylvania.

In *In re McNeill's Estate*\(^{60}\) testatrix provided that the residue of her estate should be divided into three separate trusts for the care of two dogs and one cat. Each trustee was authorized to withdraw $25 per week for each pet entrusted to her to be used for the pet's care, maintenance and support. If this sum should prove insufficient, the trustees were authorized to use so much more as in their discretion should be necessary for the purpose. On the other hand, should the stipulated stipend be more than adequate, the trustees are to retain the surplus in consideration of their services. The will stated: "The primary purpose of this Trust is to see that each of said pets is adequately cared for, given proper veterinary attention and given a decent burial at the time of their death."\(^{61}\) Upon the death of each pet the trust was to terminate and the remainder, including accumulated income, was to be distributed to the Society for the

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58. 358 Pa. at 411, 57 A.2d at 837.
59. Id., at 413, 57 A.2d at 838.
60. 41 Cal. Rptr. 139 (Dist. Ct. App. 1964).
61. Id., at 140.
Prevention of Cruelty to Animals, one-half to the Los Angeles branch and one-half to the San Francisco branch. The residue exceeded $300,000.

The probate court held the residuary trust void, accelerated the remainder, and ordered distribution to the two SPCA organizations. Neither the trustees nor the charities appealed. The report does not indicate what the two dogs and the cat said or did. This is, of course, the practical reason for requiring a *cestui que trust* in those instances where neither the Attorney General nor the court by appointment of a guardian *ad litem* will take steps to enforce the testator's intentions. It is, however, not a valid reason why the courts should not appoint guardians *ad litem* in such cases. In the analogous slave cases the courts would appoint a guardian for a slave when he claimed his freedom although a slave could not normally be a party to a civil action.⁶²

2. Conditions

In *In re Bradley's Estate*⁶³ testatrix left the residue of her estate to her housekeeper with the direction:⁶⁴ "she *must* [italics in report] take good care of my dear cats, Sister, Daddy Bimbow, Jimmy John and Tricksey." The court found this language precatory since:

... it is apparent that the testatrix intended that she should benefit from the bequest. By no known process of reasoning can the language be made to mean that any certain sum or part of the bequest was intended for the cats, and therefore the direction to take good care of the cats, although imperatively worded, imposed no obligation except as it may appeal to the discretion and good will of Mrs. Peterson; in other words, the testatrix relied upon her dear friend and companion to comply with her request, or command, to care for her cats.⁶⁵

In *Betts v. Snyder*⁶⁶ the testator in a will probated in 1895 gave a life estate in land to his widow, followed by life estates in his brother and

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⁶² 58 C.J. *Slaves* § 18 (1932).
⁶³ 59 P.2d 1129 (Wash. 1936).
⁶⁴ *Id.*, at 1131. The testatrix provided that:

> All the rest, residue and remainder of my property, of whatsoever character, real, personal or mixed, being and remaining after payment of the specific bequests hereinbefore set forth, I give, devise and bequeath unto my dear friend and companion Hattie M. Peterson of Aberdeen, Washington, and further direct that during the period of probate of my estate that the executor of this my last will and testament give to the said Hattie M. Peterson the use and occupancy of my home and that reasonable allowance be made for her for the care thereof during that period; she *must* take good care of my dear cats, Sister, Daddy Bimbow, Jimmy John and Tricksey. *Id.*

⁶⁵ *Id.*, at 1131.
⁶⁶ 341 Pa. 465, 19 A.2d 82 (1941).
sister-in-law with the "remainder to Joshua Beans and Mary Beans (Palmer) or to the survivor of them and their heirs of such survivor forever," subject to innumerable limitations on the use of the property which, if violated, the title of the violator was to be forfeited and his title would then vest in the Pennsylvania SPCA or its successors. The estate was subject to a charge in favor of testator's favorite horse, Charlie.

All the life tenants had died, the SPCA had released all its interest to the Beans and Palmer. The latter conveyed the premises free and clear of all limitations and conditions to defendant's predecessors in interest. Plaintiff alleged that the breach of conditions contained in the will combined with release of its interest by SPCA resulted in title vesting in heirs at law of testator Joshua Beans.

While it is not mentioned in the decision, it is assumed that faithful old Charlie had also departed for the happy grazing pasture. As to the possible breach of the other conditions, the court found that the language was not that of a fee simple determinable. Hence, the gift over would have to be an executory devise since it followed the gift of the absolute fee. The violation of the rule against perpetuities would not invalidate the prior estates unless the prior and ulterior estates were so intimately dependent that to uphold the former without the latter would defeat the dominant purpose of the testator. Since this was held not to be the case, the executory devise was invalid but the prior remainder was valid.

67. The will provided that all of the estates thus created should be subject to the support of testator's favorite horse, Charlie, that Charlie should at all times be kindly treated, that no cruelty of any kind to animals should ever be tolerated on that farm, that no part of the timber growing on the farm should ever be removed except as dead timber was replaced by young walnut trees, that the burial ground of testator's favorite horses was never to be ploughed over or disturbed in any way, that the farm buildings should be retained in good repair and never taken down unless they should fall down or be destroyed by fire, and that the farm wagons and sleds should be maintained forever in the wagon houses. He also provided that such of his books as his wife and sister did not desire should be taken with the bookcases that once belonged to his father and placed on the second floor of the dwelling house on the farm, there to be kept and remain forever for the use of his kindred and their descendants and for the use of the people in the neighborhood within the radius of one mile. In addition, the will stated: "And it is further my will that intoxication shall not at any time be allowed upon my said farm or plantation and that intoxicating liquors of any nature or kind shall ever be taken or used thereon as a beverage. All these conditions I earnestly and emphatically enjoin." 68. Id., at 466, 19 A.2d at 83.

68. Id., at 467, 19 A.2d at 83. The testator further provided:
And these conditions not being in restraint of alienation, but subject thereto, it is my will that they shall be observed forever, and that any owner or tenant who shall at any time disregard, fail to observe or nullify, then shall forfeit his or her title to the said farm or plantation, and the same shall then rest in the Corporation known as "The Pennsylvania Society for the Prevention of Cruelty to Animals" and its Successors forever, who shall use and enjoy it in advancing the cause of humanity to the animal creation. Id.
D. Charitable Trusts

1. In General

Charitable trusts were accepted as part of the common law in most American jurisdictions. In a few they had to be authorized by statute. Even in states with statutes authorizing charitable trusts, what constitutes a charitable purpose has been treated more as a matter of common law than a matter of interpretation of statutory language. The statutes commonly use the phrase "religious, charitable, educational or benevolent" or similar language which is broader than the older English case definition of a charitable trust.

The Restatement of Trusts, Second, Section 368, states that charitable purposes include:

(a) the relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the promotion of health;
(e) governmental or municipal purposes;
(f) other purposes the accomplishment of which is beneficial to the community.

In addition, Comment C of Section 374 of the Restatement of Trusts, Second, states:

A trust to prevent or alleviate the suffering of animals is charitable. Thus, a trust for the prevention of cruelty to animals, or a trust to establish a home for animals, or a trust for the prevention or cure or treatment of diseases or of injuries to animals, is charitable.

Section 374 of the Restatement of Trusts, Second, requires that the purpose to be promoted by the trust must be sufficiently beneficial to the community to justify the dedication of property forever to this purpose. Though a discussion of the refusal of the courts to apply a time limitation on charitable trusts analogous to the rule against perpetuities which is applied to private trusts is beyond the scope of this article, it should be noted that it is impossible for charitable trusts to last forever; and hence the validity of a trust for any purpose should not be judged by such a standard. However, the courts while mentioning this strict standard, do not actually apply it. Thus trusts for the benefit and care of animals in

69. 4 Scott, THE LAW OF TRUSTS § 348.3 (2d ed. 1956).
71. Restatement (Second) of Trusts § 374 (1959). Section 374 states: "A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable."
general are almost universally upheld. Occasionally a specific trust is objected to because it is argued it would not benefit the community or might operate to the benefit of animals harmful to man. A trust for the rearing and releasing of rattlesnakes and cobras in suburban parks would undoubtedly be invalid; but sane testators don’t establish such trusts.

2. **Trusts for the Benefit of Specific Animals**

The case law construing charitable trusts requires that in order to be charitable a gift must be for the benefit of a sufficiently large or indefinite class. This means that the settlor is not permitted to select the individuals who will benefit from the trust and still have that trust upheld as a charitable trust and hence not limited in duration by the rule against perpetuities. The power to designate the individuals to receive the benefits of the trust must rest in the trustee. Of course, the settlor may be the trustee of an *inter vivos* trust, but not of a testamentary trust.

The principle that indefinite membership in the class from which the ultimate beneficiary of the trust is to be selected in order for a gift to be charitable is violated by construing words such as “benevolent” or “humane” in statutes authorizing charitable trusts as permitting trusts for the care of specific animals. In *Willett v. Willett* the testatrix left $1000 to support and care for her dog “Dick.” In upholding the validity of this trust under the Kentucky statute, the court stated:


73. *In re Grove-Grady* [1928] 1 Ch. 557.

74. RESTATEMENT (SECOND) OF TRUSTS § 375 (1959). The Section states: “A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.”

75. 197 Ky. 663, 247 S.W. 739 (1923).

76. *Id.*, at 664, 247 S.W. at 739. The testamentary language follows:

I write this as my last will. I give my sister, Mrs. Minnie Willett everything that I have at my death for her life, at her death it is to go to the Hopewell Church for a fund to be known as the “Quincy Burgess Fund” to be used for the church, with the exception of $1,000, which is to be used for the support of our dog “Dick,” if the interest is not sufficient for him to be kept in comfort, that is being well fed, have a bed in the house by a fire and treated well every day, that the principal be used to such a sum so it will last his lifetime.

I also give Mrs. Belilah Stevens $100 for being kind to me when I needed it. Dicky must have three meals daily. *Id.*

77. All grants, conveyances, devises, gifts, heretofore made, or which shall be hereafter made, in due form of law, or any lands, tenements, rents, money, for the relief or benefit of aged or impotent and poor people, or for any other charitable or humane purpose, shall be valid, if the grant, conveyance, device, gift, appointment, or assignment shall point out, with reasonable certainty, the purposes of the charity and the beneficiaries thereof, except as hereinafter restricted.

*Id.*, at 665, 247 S.W. at 740 citing KENTUCKY STATUTE § 317, now KRS § 381.260 (1963).
While the devise did not create a charity in its strict technical sense, it was for a "humane purpose" within the meaning of our said Statutes.

There is a clear distinction between a "charity" and a "humane purpose." The latter may be sustained where the former would fail. Charity extends to every one of a class, while it is a humane purpose which moves a person to take care of or feed a single hungry person, bird, or dog.\textsuperscript{78}

As long as such interpretation of a statute does not include freeing the gift from every limitation in duration, the result is probably desirable. However, it is doubtful that this decision will be followed in other jurisdictions.

3. Preferences

There is a substantial body of case law which upholds the validity of trusts as charitable trusts even though by the terms of the trust a preference should be given to designated persons in selecting those who are to benefit directly from the trust.\textsuperscript{79} Analytically such terms merely engraft a private trust onto a charitable trust. Hence, if the provision for the descendants of the settlor or other similar provisions violate the rule against perpetuities, it should be held invalid. Only if the dominant purpose of the testator were to provide for his descendants within the framework of the charitable trust would the charitable trust itself fail. It is doubtful that the courts would often find such a noncharitable dominant intention. However, the courts have not adopted this approach to such preferential terms in charitable trusts.

In \textit{In re Forrester's Estate}\textsuperscript{80} the testator left property to the Colorado State Board of Child and Animal Protection requesting that it be used in perpetuity for the relief of animals in Colorado and especially requesting "that my dog Shep (if living) be given every care and a good home during his life and a decent burial upon his passing."\textsuperscript{81} The court held

\textit{78. Id., at 666, 247 S.W. at 740.}

\textit{79. Brand v. Earl of Devon, L.R. 3 Ch. 800 (1868); Tarver v. Weaver, 221 Ala. 663, 130 So. 209 (1930); Dexter v. President and Fellows of Harvard College, 176 Mass. 192, 57 N.E. 371 (1900); In re MacDowell's Will, 217 N.Y. 454, 112 N.E. 177 (1916); Commonwealth Trust Co. of Pittsburgh v. Granger, 57 F. Supp. 502 (W.D. Pa. 1944); Stewart's Estate, 48 Pa. D. & C. 526 (1943). See \textit{ANNOT.}, 131 A.L.R. 1277 (1941) for a discussion of provisions for relief or education of member of family or relatives as creating a charitable trust.}

\textit{80. 86 Colo. 221, 279 P. 721 (1929).}

\textit{81. Id., at 222, 279 P. at 722. The testator further provided: Ninth: Should I be unmarried at the time of my death I give and bequeath all the balance of my estate (after my just debts are paid) of every name and nature, and description, consisting of real estate in Denver, and Pueblo and Adams County, Colorado, moneys and bonds in banks in Denver, personal effects, my insurance
this language was merely precatory and did not result in the invalidity of the bequest. Though it was not in issue, it appears that the court regarded this language as unenforceable.

The holding of bequests for the care of specific animals valid as charitable trusts would seem desirable because this would make the intention of the testator enforceable. Testators really do not intend that such bequests may be defeated by a trustee who is unwilling to perform as is the case when the bequests are held to be honorary trusts or when the language is held to be an invalid condition.

The substantial objection to such a holding is that it would free the gift from compliance with the rule against perpetuities. There is no reason, however, why the courts could not develop a rule analogous to the rule against perpetuities to limit the permissible duration of such gifts to the lives of specifically designated animals in being at the time of the testator's death.

IV. CONCLUSION

Honorary trusts for the benefit of specific animals are valid in England, Ohio, Kentucky and probably Tennessee. They have been invalid in New York and California and are probably invalid in Pennsylvania. The language of testators directing or requesting their pets to be cared for has generally not been enforced. Either the language is construed as precatory or the condition is held invalid.

Despite the almost universal approval of legal scholarship, it does not appear that there is any judicial trend toward upholding the validity of bequests for specific animals, let alone providing for judicial enforcement of the intention of the testator that his pets be properly provided for after his death.

business (which should be sold to the highest bidder) all I give and bequeath to the Colorado State Board of Child and Animal Protection (E. K. Whitehead Secy. at this date) requesting it to use the same in perpetuity, in affording relief to hungry, thirsty, abused and neglected cattle, horses, dogs and cats in Denver, and in Colorado at large, and to use the income, or the principal at its discretion, in prosecuting those who neglect animals or who abuse them. I request that three (3) iron drinking fountains for animals be erected in downtown Denver, the City of Denver having been niggardly and selfish in that respect; I especially request that my dog Shep (if living) be given every care and a good home during his life and a decent burial upon his passing. Any person may be proud of this dog's friendship. No part of my estate is to be spent upon human beings (except as specifically stated herein) nor upon, or for the so-called Juvenile Court of Denver. Should the said State Board of Child and Animal Protection be legislated out of business, or be superseded by another institution of its kind, whether state or private, then this bequest is to go to its successor. I request the Home Savings and Trust Company and Frank L. Bishop of Denver, to act as my Executor, in connection with the State of Colorado, the latter being the principal beneficiary hereunder. (The State Board of Child and Animal Protection being at this date a State institution.)
There appears to be no substantial objection to bequests for the care of specific animals on grounds of social policy. Compulsory accounting by trustees of such testamentary trusts could provide for their performance in view of the lack of a *cestui que trust* capable of raising objections to the trustee’s conduct. Since the public policy reasons behind the rule against perpetuities are not applicable to such bequests, the rule should be held inapplicable; and an analogous limitation on the duration of such trusts should be developed measured on the animal “beneficiary’s” life.